BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)	**WT Docket No. 95-157**

To: The Commission

REPLY COMMENTS OF THE SOUTHERN COMPANY

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Southern is alarmed by the Comments filed by the PCS community which seek to turn back the clock to reopen and rewrite the transition rules promulgated in ET Docket No. 92-9. The recommendations made by PCS licensees in this proceeding go far beyond the creation of reimbursement obligations on PCS licensees who will benefit from the relocation of microwave licensees. The PCS industry, rather, focuses on remedying what they believe to be unnecessary protections for the microwave community. Their failure to timely consider and comment on the needs of the microwave community and the costs associated with the relocation has placed them in a quandary. Rather than seeking redress in ET Docket No. 92-9, where their recommendations would have been at best timely, many in the PCS community now ask the Commission to revisit these issues. This, the Commission should not do. Instead the Commission should focus on the stated purpose of this proceeding which is to fashion fair cost-sharing rules.

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The Southern Company ("Southern"), through its undersigned counsel and pursuant to Section 1.415 of the Federal Communications Commission's ("Commission") rules, respectfully submits the following Reply Comments in the above-captioned Notice of Proposed Rule Making ("NPRM") proceeding.[1/]

1/ Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, Notice of Proposed Rule Making, adopted October 12, 1995, 60 Fed. Reg. 55529 (November 1, 1995).

INTRODUCTION

1. Southern participated in the initial stage of this proceeding by filing Comments which generally supported what it understood was the primary focus of this proceeding--establishing a plan whereby PCS licensees would share the costs of 2 GHz microwave relocation. In its Comments, Southern stressed that the Commission's proposed cost-sharing plan should not adversely affect the negotiation process or hinder the existing protections given to microwave incumbents based on the final transition rules promulgated in ET Docket No. 92-9. However, upon reviewing the Comments filed by other parties, Southern is alarmed at the recommendations being made by the PCS community as they seek to reopen ET Docket No. 92-9 and rewrite the transition rules which have already been finalized. Southern submits the following Reply Comments in response to recommendations made by PCS licensees.

REPLY COMMENTS

I. The Time for Reconsideration Has Past and the PCS Recommendations to Change the Transition Rules Must Be Dismissed

2. Rather than facilitating the relocation cost-sharing between PCS licensees, a number of the commenting

parties are attempting to use this proceeding as an opportunity to open the door to re-writing the PCS transition rules.[2/] The Commission was clear in its statement that it does not intend to reconsider any of its previous transition rules in this proceeding, the time for reconsideration having already passed: "We emphasize that our intent is not to reopen that proceeding here because we believe that the general approach to relocation in our existing rules is sound and equitable."[3/] Accordingly, the only appropriate focus for this proceeding is issues concerning reimbursement rights of PCS licensees who relocate links that will subsequently benefit other PCS licensees. See, Truck Lines v. United States, 371 U.S. 156, 168-169 (1962), SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).

3. Nevertheless, comments of the PCS licensees in this proceeding evince a desire to drastically change the transition rules. The time for reconsideration, however, has passed; any rewrite of the transition rules at this time would be a clear violation of the Administrative Procedures Act.

[2/] Third Report and Order and Memorandum, Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

[3/] NPRM at ¶ 3 (Emphasis added).

A. The Original Definition of "Comparable Facilities" Must Be Retained

4. The Commission must maintain the original definition of "comparable facilities": a replacement system that is equal to or superior to the fixed microwave facility being replaced. The microwave parties commenting in this proceeding have vividly described the critical function their 2 GHz microwave systems serve, and have expressed concern that any degradation of their current facilities is unacceptable.[4/] These commenters agreed with Southern that the current definition of "comparable facilities" must be maintained, especially in terms of system reliability.[5/] Moreover, the microwave commenters have pointed out the inequity in allowing PCS licensees to pay the depreciated value of the analog system, or replace their current systems

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[4/] Los Angeles County Sheriff's Department at 1-2, National Rural Electric Cooperative Association (NRECA) at 1, Interstate Natural Gas Association of America at 1-2 and Tenneco Energy at 3-6.

[5/] Southern at 10, Association of American Railroads (AAR) at 5-6, Tenneco at 9-10, Cox & Smith at 4-5 and Southern California Gas Company (SoCal) at 14.

with another, albeit "new," analog system.[6/] Southern agrees.

5. First, allowing a PCS licensee to fulfill its obligations by paying for the depreciated value of the analog equipment in the event that no suitable analog equipment is available would not constitute a replacement of the system at all. Instead, microwave incumbents would be left with far less than they started with. Microwave incumbents would therefore be required to pay for their own relocation costs which is fundamentally contrary to the spirit and letter of the Commission's transition rules.

6. Second, microwave incumbents will find it more and more difficult to obtain equipment or component parts to repair or replace analog equipment since many manufacturers are phasing out the production of analog microwave equipment. It is far more economical, convenient and consistent with the original definition of comparable facilities to allow replacement with digital equipment. Indeed, one commenter noted that digital equipment is

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[6/] Utilities Telecommunications Council (UTC) at 25, Tenneco at 11, SoCal at 16, Maine Microwave Associates at 4, and Association of Public Safety Communications Officials-International, Inc. (APCO) at 7.

actually less expensive than analog equipment.[7/] Accordingly, Southern opposes the self-serving comments of the PCS licensees which urge the Commission to change a fundamental component of its carefully balanced transition rules.[8/]

7. Southern also opposes the recommendation that independent cost estimates be used in the event that the negotiating parties disagree as to what is comparable. Use of cost estimates undermines the flexibility of voluntary negotiations which, the Commission is on record as stating, are not defined by any parameters. As many parties have stated, this concept negates the principles of voluntary negotiations and should not be adopted.[9/]

B. Introduction of a New Definition "Good Faith" is Unreasonable and Beyond the Scope of this Proceeding

8. The Commission has suggested that during the mandatory relocation period an offer to relocate the microwave incumbent's facilities is a good faith offer, and

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[7/] Comments of Alexander Utility Engineering, Inc. (AUE) at 4-5.

[8/] Southwestern Bell Mobile Systems (SBMS) at 3, PCS PrimeCo at 18 and Sprint TV at 27.

[9/] UTC at 26-27 and Valero at 5.

failure by the incumbent to accept the offer is "bad faith".[10/] Naturally, the PCS industry supported this concept and even asked that the Commission impose this "clarification" in the voluntary period as well.[11/] Good faith is always a requirement for all parties during negotiations. However, the specific definition of "good faith" as suggested by the Commission and supported by the PCS industry is unfair. No party should be required to accept, at the peril of being penalized, an offer that is wholly unreasonable on its face, or an offer that would not provide an incumbent with the same coverage, capacity or reliability. As espoused by a number of the PCS commenters, this arrangement would be an extraordinary burden on microwave incumbents in the negotiation process. Reasonable counteroffers should be acceptable and Southern supports comments consistent with this view.[12/] Southern also believes that other penalties suggested by PCS licensees for a microwave incumbent's failure to act in good faith are punitive and unnecessary.[13/]

[10/] NPRM at ¶ 69.

[11/] SBMS at 2-3, AT&T Wireless at 15, and Sprint TV at 18-19.

[12/] AAR at 14, Tenneco at 8, and Industrial Telecommunications Association (ITA) at 4.

[13/] PCS PrimeCo at 17, BellSouth Mobility at 20, Pac Bell 9-10, and Personal Communications Industry Association

(continued...)

9. Because of the substantive impact that a new definition of "good faith" would have on the mandatory negotiations, Southern believes that this interpretation goes beyond mere clarification and would fundamentally change current transition rules. The Commission must not lose sight of the purpose of this proceeding -- to establish relocation reimbursement rights for PCS licensees. A reinterpretation of the negotiating process is beyond the scope of this proceeding.

II. Commenters Agree that Existing Protections for Microwave Incumbents Should Not be Changed

A. Primary Licensing Status

10. The Comments of the microwave community echoed those of Southern regarding the retention of primary status where no PCS licensee offers to relocate a microwave incumbent. In such cases, the incumbent must be allowed to maintain its primary licensing status indefinitely, and must further have the assurance that if interference occurs it can be relocated by the PCS licensee.[14/] Moreover, this

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[13/](...continued)
(PCIA) at 17, all seeking to reduce the licensing status to secondary for bad faith negotiators.

[14/] UTC at 29-30, Valero at 5, AAR at 8-9, Tenneco at 14-15, AGA at 5, APCO at 11-12, East River Electric Power Cooperative at 2-3, SoCal at 12, NRECA at 7, Maine Microwave at 4, and American Public Power Association at 4-5.

policy is contrary to the finalized transition rules. See, 47 C.F.R. § 94.59(c). The PCS industry, in contrast, not only opposes continued primary licensing status beyond 2005, but seeks to restrict renewal applications as early as April 4, 1996.[15/] This is unacceptable.

11. In it Comments, Southern also has sought protection of the licensing status of its existing facilities when minor modifications are required. The NPRM proposes to tighten the standards on classification of minor modifications by requiring microwave incumbents to show that such modifications will not increase relocation costs. One PCS licensee suggested revisiting all modifications made after January 16, 1992, stating that these modifications should not be afforded primary licensing status.[16/] Southern submits that it is unreasonable to treat separate links of the same system differently when a minor modification is necessary. Taken to its logical conclusion, a microwave licensee could be left with a system where some links are primary and subject to interference protection whereas other links are secondary and afforded no protection. Such a scenario would create an unacceptable

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[15/] PCIA at 22, Pac Bell at 12 and PCS PrimeCo at 19.

[16/] SBMS at 9.

operating environment for a microwave system carrying critical communications.

B. Twelve-Month Trial Period

12. The PCS industry now seeks to shorten the established 12-month trial period, and in one instance, seeks to shorten the period to one month.[17/] Other PCS licensees seek to have the microwave incumbent surrender its license during this period with no opportunity to regain it should the replacement systems prove unworkable during the trial period.[18/] In Southern's opinion, these recommendations are unreasonable. The Commission's policy is clear on this point. Microwave incumbents must be given 12 months to test the new system. If the facilities are not comparable, then microwave incumbents must be able to be relocated back to their existing 2 GHz facilities. 47 C.F.R. § 94.59(e). The finality of these rules makes it impossible for the Commission to consider recommendations suggested by the PCS industry on this issue.

17/ PCS PrimeCo at 19. Pac Bell seeks to eliminate the trial period altogether. Comments of Pac Bell at 8.

18/ SBMS at 5-6, Cellular Telecommunications Industry Association at 13 and BellSouth at 11.

III. The Reimbursement Cap Was Not Well Received by Both PCS and Microwave Communities

13. Although the parties understood the Commission's justification for a reimbursement cap, the cap was not favored by most commenters. The microwave community adamantly opposed the cap as being arbitrary, artificially low and inadequate in cases where costs may greatly exceed the cap. They also questioned the credibility of sources cited in the NPRM for selecting this vague figure.[19/] The microwave community agreed with Southern that the cap is an indirect method of limiting the value of microwave systems and effectively hinders the negotiation process.[20/] Similarly, the PCS industry was not uniformly in favor of the cap. In fact, GTE commented that the cap will not make more certain the costs to be paid by future PCS licensees.[21/] Other PCS licensees acknowledged that actual costs may exceed the cap, and like Southern, recommended a floating cap.[22/] The Commission must acknowledge that in many instances the actual relocation costs will exceed the proposed cap. Therefore, Southern reiterates its

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19/ See e.g., Tenneco at 12.

20/ UTC at 12-13, Valero at 3, AAR at 10, SoCal at 6, Maine Microwave at 2-3, American Gas Association (AGA) at 4-5, and NRECA at 5.

21/ Comments of GTE at 15.

22/ BellSouth at 7 and Sprint TV at 27.

recommendation that any cap that is imposed be a floating one based on either actual costs or "Target Cost."[23/]

IV. Commenters Agree that Adjacent Channel Interference Must Be Included in Determining Reimbursement Obligations

14. Southern advocated the inclusion of adjacent channel interference as well as co-channel interference as factors which trigger the reimbursement obligations.[24/] With a few exceptions, the majority of commenters, including PCS entities, agreed with Southern on this point.[25/] Because microwave incumbents currently receive adjacent channel interference protection and they must be notified of such interference during the Prior Coordination notification period, Southern believes that protection from adjacent channels must be preserved.

CONCLUSION

15. In summary, Southern requests that the integrity of the current transition rules be maintained, and that the Commission not allow the PCS industry to re-write these

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23/ Southern at 5-6.

24/ Southern at 8-10.

25/ See e.g., UTC at 7, AAR at 13, TIA at 4-6 and SBMS at 6.

rules. Southern also submits that microwave incumbents continue to have the flexibility needed to negotiate in good faith without unnecessary regulatory intervention, such as caps, and without re-defining the negotiating process. Southern urges the Commission to focus solely on creating rules which will facilitate the reimbursement process in this proceeding. All other recommendations seeking changes to the transition rule must be dismissed.

WHEREFORE THE PREMISES CONSIDERED, The Southern Company respectfully requests that the Commission act upon these Reply Comments in a manner consistent with the views expressed herein.

Respectfully submitted,

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